No. 92-519

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

BOYLE JOHNSON, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHELL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal From The United States
District Court For The Northern District Of Florida

BRIEF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Latino voters in numerous voting rights cases, has frequently appeared before this Court in such cases, *see, e.g., City of Lockhart v. United States*, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, *see Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. ___, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, *see, e.g., Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992).

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. Since its inception, PRLDEF has worked to politically empower the Puerto Rican and Latino communities. Barriers to Latino political participation have been lifted, and voting rights violations have been successfully challenged by PRLDEF in the courts and

[1] Letters consenting to the filing of this brief have been filed with the clerk of the court.

before the United States Department of Justice. PRLDEF is currently working to ensure equal opportunity for Puerto Ricans and other Latinos in the redistricting process which is, and has been, occurring throughout the country as a consequence of the decennial census. PRLDEF currently is, and has been, engaged in litigation surrounding this latest round of redistricting, *see e.g., PRLDEF, et al., v. City of New York*, 769 F. Supp. 74 (E.D.N.Y. 1991) (City Council redistricting); *PRLDEF, et al., v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (three-judge court) (Congressional redistricting).

SUMMARY OF ARGUMENT

State appellants ask this Court to reject the district court's findings of fact that the Latino community is sufficiently large to form a majority in eleven seats in the Florida House of Representatives. They seek to have this Court create a new rule only for the Latino population that would require assessment of the Latino population's right to representation under the Voting Rights Act in a manner different from all other populations in the state. This new criteria would require only Latino communities to demonstrate the effectiveness of a district by showing a clear citizenship voting age population (hereinafter, CVAP) majority before liability can be established.

State appellants effectively ask this Court to reject the district court's findings of fact based on a race-based presumption that the Latino community is disproportionately composed of non-citizens. Trial testimony established that the eleven Florida State House districts

proposed by appellees (each with a Latino voting age population (hereinafter, VAP) of 59% or greater) would result in an electable Latino district. Yet, State appellants argue that, based on their measure of citizen voting age population alone, the Court was precluded from even a liability finding in this action. Their argument is wholly without merit.

First, such race-based presumptions have consistently been rejected as impermissible State behavior. *Cf., eg. Palmore v. Sidoti*, 466 U.S. 429 (1984). Nowhere in the record have State appellants challenged the right of any other population to equitable levels of representation or the effectiveness of districts created based on an assessment of the number of citizens believed present in the population, despite the very large non-Latino immigrant populations present in the state. The assumption, therefore, is that the State appellants would have this Court establish an unprecedented race-based presumption in voting rights cases for Latino populations throughout this country that will not be applied to any other populations, and will ultimately act as a bar to equal representation for Latinos.

State appellants urge that such a rule be established despite the fact that when redistricting takes place, citizenship population data is not available from the Census and total population data is used to construct districts for one-person, one-vote purposes.[2]

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[2] Typically, redistricting of election districts occurs during the period following release of the decennial census data by the Bureau of the Census to the states in the early part of the first year after the enumeration and before election processes begin

Second, appellants seek to elevate one factor in cases concerning Latino voting rights – the percentage of citizenship voting age population – to a brightline bar to liability under Section 2 of the Voting Rights Act. Section 2, however, does not impose a brightline test for liability for any population group. The test is one of the "totality of the circumstances," based on an intensive local and practical appraisal.

Third, even assuming arguendo that citizenship population is relevant in demonstrating the first prong of the test set forth in *Thornburg v. Gingles*, 478 U.S. 301, 50 (1986), i.e., that the minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district," the district court found appellees' evidence concerning the viability of Latino districts credible. The district court rejected appellants' evidence on the Latino citizenship voting age population. Those findings of fact are not clearly erroneous and must be upheld.

Furthermore, contrary to appellants' arguments, the district court entered appropriate remedial relief, and the

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for the subsequent year. At that time only two sets of demographic data are available – total population data and voting age population data. Census information on responses to survey questions, like citizenship status, is not compiled or released by the Bureau until about a year later, well after the redistricting processes in most jurisdictions have been completed, and election processes begun or finalized. Thus, citizenship data per se has never been considered in either apportionment or redistricting exercises by states.

United States was not precluded from bringing this action by a decision of the Florida Supreme Court.

ARGUMENT

I

THE DISTRICT COURT'S DETERMINATION THAT THE LATINO COMMUNITY WAS SUFFICIENTLY LARGE TO BE A MAJORITY IN ELEVEN STATE HOUSE SEATS IS NOT CLEARLY ERRONEOUS.

A. Section 2 Liability is Established Under A Totality of Circumstances Test

State appellants argue that plaintiffs below have not established liability because certain proposed Latino supermajority districts allegedly do not have Latino citizenship voting age majorities. No where in the statute or the legislative history of the Voting Rights Act does Congress erect such a barrier to the protection of minority voting rights. 42 U.S.C. § 1973.

The statute and legislative history of the Act make clear that courts are not to measure the viability of a claim by one isolated factor. Rather, Congress intended that courts assess the totality of the circumstances in determining whether a challenged election system or practice results in discrimination. "Plaintiffs must either prove . . . intent, or alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. Rep. No. 97-417, 97th Cong. 2d Sess. 27, *reprinted*

in 1982 U.S. Code Cong. & Admin News 177, 205 (hereinafter "S.Rep."). To establish a claim, the Senate Report listed a number of typical factors which could be shown and which would be indicative of discrimination in voting. S.Rep. at 28-29.

While Congress enumerated these factors, it made clear "that there [was] no requirement that any particular number of factors be prove[n], or that a majority of them point one way or the other." *Id.* at 29. Congress also made clear that these factors were not to be used as a "mechanical 'point counting' device," and that "[t]he failure of [a] plaintiff to establish any factor is not rebuttal evidence of non-dilution." *Id.* at 29 n.118. "Rather, the provision requires the Court's overall judgment, based on the totality of circumstances, and guided by *those relevant factors in the particular case*, of whether the voting strength of voters is . . . 'minimized or canceled out.' " *Id.* (emphasis added).

Thus, Congress intended courts to make determinations based on the totality of factors relevant to the specific cases before them and not to eliminate claims based on a certain checklist or threshold of factors. The question of whether the political process is " 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *Id.* at p. 30, *quoting White v. Register* 412 U.S. 755, 769-770 (1973). The "ultimate test" is "whether, in the particular situation, the practice operated to deny the plaintiff an equal opportunity to participate and to elect candidates of their choice." S. Rep. at 30. It is contrary to the clear intent of Congress to elevate any one factor – here, citizenship voting age population – to bar

liability under the Act. State appellants' arguments to the contrary are without merit.

B. Under the Totality of the Circumstances The District Court Did Not Err In Finding That The Florida State Plan Denied Latinos An Equal Opportunity to Elect Representatives of Their Choice.

To determine whether a minority community has been denied equal electoral opportunity, courts have traditionally used as the measure of equal opportunity the potential of a protected class to elect representatives in single member districts. As this Court stated in pertinent part in *Gingles*:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.

[478 U.S. at 50 n. 17 (emphasis in original)].

Thus, the gravamen of section 2 liability is whether the electoral structure adopted denies the *potential* of a particular group to elect representatives.

No brightline test exists for establishing that a protected class is sufficiently large to have been denied equal electoral opportunity through vote dilution. Rather, a district by district analysis is required to assess the percentage of a protected class necessary to create a minority district. *Cf. Gingles*, 478 U.S. at 55-56 ("the degree of bloc voting which constitutes the threshold will vary from district to district.").

The judgment of the lower courts is crucial in weighing the factors based on the local context. This Court has recognized the importance of "an intensely local appraisal" in vote dilution cases. *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). This Court has also noted the particular expertise of district court judges, who are familiar with local conditions and history, in making these appraisals.

Thus, courts in various localities have arrived at different conclusions based on their local appraisals of the totality of the circumstances. *Compare Ketchum v. Byrne*, 740 F.2d 1398, 1413-1416 (7th Cir. 1984) *with Nash v. Blunt*, 797 F. Supp. 1488, 1500 (W.D. Mo. 1992) (three-judge court), *aff'd sub nom., African-American Voting Rights Legal Defense Fund v. Blunt*, 113 S. Ct. 1809 (1993) (holding a district with 51.2% black VAP has an effective black majority when black incumbency and party affiliation were considered.)

Here, the district court assessed the electoral history of each of eleven supermajority Latino districts proposed by plaintiffs to determine liability.

State appellants argued that appellees failed to establish liability because some of the Latino districts in appellees' alternate House plan had citizen voting age populations that were too low, and therefore the districts were ineffective. However, the district court credited testimony that established districts with a 59% Latino VAP were viable and that each of the eleven proposed Latino House districts had Latino VAP of 60% or more. U.S.J.S. App. at 36a, 40a.[3] Thus, it properly concluded that all eleven of appellees' districts were "sufficiently large and geographically compact" to establish that the State plan denied Latinos equal electoral opportunity.

The district court properly conducted a local appraisal, taking into account relevant, specific factors regarding citizenship in determining liability under the "sufficiently large" prong of *Gingles*.[4]

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[3] Because there was little data about citizenship, the state's argument was based on what was termed "a somewhat unorthodox regression analysis." U.S.J.S. App. at 74a (Vinson , J., concurring). Based on this speculation, the state arrived at a non-citizenship rate for Hispanics of 55 percent. *Id*. at 38a n. 25; *id*. at 74a (Vinson, J., concurring). This calculation was used to justify creating 9 rather than 11 Hispanic districts in Dade County. The court rejected the state's insensitive figures, focusing instead on past election results.

[4] A district court's findings regarding the level of minority population necessary to comprise an effective majority should be overturned only if clearly erroneous. *Fletcher v. Golder*, 959 F.2d 106, 110 (8th Cir. 1992). Here, the district court's liability determination should be affirmed; it is not clearly erroneous. Amici do not take the position that proof of viability of a district is necessary to demonstrate that a protected class is sufficiently large and geographically compact. For example, the demonstration that a protected class is a majority of the total population of a district has been held sufficient to demonstrate the first prong of *Gingles*. *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) *cert. denied*, 492 U.S. 905 (1989).

C. Using Total Population, Voting Age Population and Electoral History Data in Redistricting Preserves Important Constitutional Values

Historically total population has been the relevant determinant for assessing one-person, one-vote compliance both in congressional reapportionment under Article I, § 2 of the United States Constitution, and in local and state reapportionment under the Fourteenth Amendment to the United States Constitution. The "population base for purposes of apportionment has always included all persons, including aliens. . . . " *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980). When Congress passed the Fourteenth Amendment, it chose to count the "whole number of persons" for purposes of congressional apportionment. U.S. Const. amend. XIV, § 2. The use of "voters" or "citizens" instead of "persons" was debated and rejected. *FAIR*, 486 F. Supp. at 576. The principle of representation based on total persons is grounded in the Constitution. Most recently, in *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (U.S. Mar. 2, 1993), this Court required a remand of the case, based on a **total population** deviation of State legislative districts which exceeded 10% of the ideal district size. 61 U.S.L.W. 4203[5].

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[5] This Court has acknowledged that in using total population figures for apportionment purposes, actual voters might be spread disproportionately across districts. *Gaffney v. Cummings*, 412 U.S. 735, 746-49 (1973). While recognizing that age, alienage,

Here, Florida used U.S. census total population figures for reapportionment purposes, as required under state law. Fla. Stat. Ann. ch. 10.1001 (1)-(2) (Harrison's 1992 Cumulative Pocket Part.).

Typically, at the time of redistricting only two types of demographic data are available – total population data and voting age population data. Citizenship population data is generally not available. If at the time redistricting takes place, state reapportionment bodies are faced with data reflecting the possibility of creating districts with Latino supermajority total populations and voting age populations, but are permitted to act on a presumption that Latino non-citizenship rates do not require the creation of these potential Latino majority districts, Latino communities are likely to be divided and their vote diluted. This would communicate that Latino communities are of less value and importance to our society.

Representatives of electoral districts serve both citizens and non-citizens, minors and adults. All persons regardless of citizenship status or age have the right to petition their government. As the court in *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990) *cert. denied*, 498 U.S. ___, 111 S.Ct. 681 (1991), stated:

> [B]asing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the

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and nonresidence can create unequal voting populations across districts when apportionment is based on total population, this Court in *Gaffney* declined to find unequal voting populations unconstitutional.

> access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative. For over a century, the Supreme Court has recognized that aliens are "persons" within the meaning of the fourteenth amendment to the Constitution, entitled to equal protection. *See Yick Wo v. Hopkins*, 118 U.S. 356, 368, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). This equal protection right serves to allow political participation short of voting or holding a sensitive public office.

[citations partially omitted.]

Finally, a third set of data is normally available at the time of reapportionment – electoral history data – including voter registration information, turn-out analyses, and electoral results. That data in conjunction with population information and other evidence, demonstrated the existence of racial bloc voting which would deny Latinos electoral opportunities if their votes were submerged into non-Latino districts. It also demonstrated that Latino districts with a VAP of 59% or greater are viable Latino districts, with effective Latino majorities. Based on the totality of circumstances the district court properly found liability and ordered a remedy.

An automatic adjustment for citizenship would have violated the totality of the circumstances standard and created a race-based eligibility presumption against Latinos not applicable to other segments of the population, in violation of the Fourteenth Amendment.

II

THE DISTRICT COURT ENTERED APPROPRIATE REMEDIAL RELIEF

Appellants argue here that the court should have permitted the State legislature the opportunity to submit a remedial plan and that the remedy chosen was inappropriate because: (1) it impacted on more districts than necessary to remedy the violation and (2) it fragmented segments of the white community who are not a protected class under the Voting Rights Act. Given the exigent circumstances and the failure of the state to timely submit a non-violative plan, a court ordered remedy was appropriate.

A. Violations of Section 2 Require A Complete Remedy

The legislative history of the 1982 amendments to Section 2 of the Voting Rights Act makes clear that a district court must use its equitable powers to fully remedy any violations of the Act. As stated in the Senate Report accompanying the Act:

> The Court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. at p. 31.

Thus, the general principles governing the equitable powers of federal courts are well settled. In fashioning and effectuating their voting rights decrees, federal

courts are to be guided by equitable principles. *See Rogers v. Lodge*, 458 U.S. 613, 627-28 (1982). Essentially, voting rights remedies should be determined by the nature and scope of the constitutional violation. *Id.*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). The remedy must therefore be tailored to cure the "condition that offends the Constitution." *Rogers*, 458 U.S. at 627. Federal courts in voting rights cases have used a variety of remedies to effectuate their orders. Federal courts may, where appropriate, enjoin elections, set aside elections, and even adopt their own temporary redistricting plan. *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982); *Upham v. Seamon*, 456 U.S. 37, 43-4 (1982); *Connor v. Finch*, 431 U.S. 407, 425 en. 426 (1977); *Mahan v. Howell*, 410 U.S. 315, 332 (1973); *Reynolds v. Sims*, 377 U.S. 533, 585, 1394 (1964); *Hammer v. Campbell*, 358 F.2d 215, 224 (5th Cir. 1966); *Terrazas v. Slagle*, 789 F.Supp. 828 (W.D. Tex. 1992).

In *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), the court struck down a remedial redistricting plan proposed by a local board of supervisors and adopted by the district court to remedy a one-person, one-vote violation. It found there had been a history of denial of equal political opportunity to black voters in Hinds County, Mississippi. It also found that the supervisors' reapportionment plan, adopted as the court-ordered plan, would have the effect of perpetuating the denial of access to the political process. *Kirksey, supra*, 554 F.2d at 148.

The plan the court rejected created two districts that had black voting age populations of slightly under 50%. The expert witness concluded that in these districts it would have been "unlikely if not impossible for blacks to

ever elect a candidate of their choice." *Kirksey, supra*, 554 F.2d at 149.

Not only did the court find that the remedial plan was invalid on constitutional grounds, but also that it was invalid because it was an abuse of discretion for the district court in exercising its remedial power to "approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process." 554 F.2d at 152.

These cases establish the equitable principles to be employed by a district court in fashioning a remedy. A court-ordered remedy should, to the greatest possible extent, remedy the found violations of the Voting Rights Act. Any court adopted remedy cannot perpetuate a denial of equal opportunity and should be analyzed for compliance with the Voting Rights Act. A remedial redistricting plan should create winnable minority districts.

B. Section 2 Analysis of Remedial Plans

In the usual Section 2 case involving redistricting, under the totality of circumstances test of the statute, plaintiffs will have demonstrated that members of a protected class have been denied an equal opportunity to participate in the political process and elect representatives of their choice. In this circumstance, the primary remedial criteria is whether the plan adopted creates minority districts in which the protected class has "an effective majority." *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984), *cert denied*, 471 U.S. 1135 (1985). A district has an effective majority when the protected class's share

of the district's population is large enough to provide the protected class with a realistic opportunity to elect an official of their choice. *Id.* In determining that share, a court may weigh a number of factors including: the minority population, the minority voting age population, the minority voter registration, and turn-out patterns. *Id.* at 1413.

If there is more than one protected class, district courts should undertake a searching examination of the same Senate factors specified by Congress to determine liability, to determine the appropriate remedy. See *supra* part I, § A. Following normal equity practice, these factors should be assessed on a case by case basis. These factors also should be applied in a totality of circumstances approach to determine the appropriateness of a suggested remedy.

The initial analysis in circumstances where there is more than one protected class is to determine whether the protected classes are politically cohesive or whether they are politically antagonistic. If it is determined that there is no political cohesion between the protected classes, distinct districts normally should be drawn for the two groups. If distinct districts cannot be drawn, i.e. where the drawing of districts for one group conflicts with the drawing of districts for the other group, then the Court must fashion a remedy that ensures that no group is disproportionately excluded from the political process. The Court must weigh the relative political opportunity of the two classes. Such relative political opportunity is measured by comparing the ability of the different classes to elect representatives to the size of each of their total

populations in the jurisdiction. The class with least ability to elect representatives of its own choice normally should be favored when resolving conflicts between the two classes and should not be disproportionately excluded in the drawing of remedial districts.

C. Appropriate Remedial Procedure

Subsequent, to a finding of liability under Section 2, a jurisdiction found in violation of the Act is normally given an opportunity to propose a remedy to the violation. Such remedy is subject to review to determine whether the plan is in compliance with Section 2. *Gingles v. Edmisten*, 590 F. Supp. 345, 376 (E.D.N.C. 1984) *affirmed in part sub nom, Thornburg v. Gingles*, 478 U.S. 30 (1986). However, the remedy proposed must be submitted to the district court in time to ensure that a non-discriminatory plan is in place prior to the next scheduled election. If a non-violative plan is not submitted, the district court has the duty to order the implementation of a non-violative plan. *See Edmisten*, 590 F. Supp. at 376; *see also, Camp v. Wesch*, 60 U.S.L.W. 3768 (U.S. May 19, 1992) (summarily affirming a district court remedy which ordered a redistricting plan to be used for upcoming elections, unless the

State legislature adopted a timely constitutional plan);[6] *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1992).

Therefore, while a jurisdiction should be allowed to submit a proposed remedy for court review, that opportunity must be limited to timely submissions, which will remedy a Voting Rights Act violation prior to upcoming elections. *See also* Part III, § A, sub-section 1, *infra*.

D. Application of Remedial Standards

Given the totality of circumstances and the failure of the State to submit a non-violative plan at the time the district court rendered its decision, it appropriately ordered remedial relief. There is no assertion that African-American voters were denied districts in which they have effective majorities by the court's adoption of Latino House districts with effective majorities, and that as a consequence they were denied relative political opportunity as compared to Latinos.[7]

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[6] The United States District Court in *Wesch*, on March 9, 1992, adopted a statewide congressional redistricting plan for Alabama. The Alabama Legislature had passed a congressional redistricting plan prior to the rendering of the district court's decision, but that plan had not yet been precleared. Slip. Op. at 9-10, par. 22. The district court entered an order which required that its adopted plan be used for the 1992 congressional elections unless "the Alabama Legislature duly [enacted] a redistricting plan for the conduct of congressional elections in 1992 and [had] the same precleared no later than 12:00 noon, Central Time, March 27, 1992."

[7] There is also no assertion that white voters were harmed because in the court's remedial plan they are underrepresented and were intentionally discriminated against. Subsegments of

III

CIVIL RIGHTS PLAINTIFFS HAVE A RIGHT TO CHOOSE A FEDERAL FORUM TO LITIGATE FEDERAL CLAIMS AND ARE NOT PRECLUDED BY STATE COURT DECISIONS TO WHICH THEY ARE NOT A PARTY

Appellants make the unprecedented argument that the United States, a non-party to the Florida State proceeding, is precluded from challenging Florida's redistricting under federal law in federal district court. Appellants are wrong. First, to do what Appellants suggest would impose an exhaustion requirement on voting rights plaintiffs contrary to the explicit statutory language of the Voting Rights Act and decisions of this Court. Second, it would give preclusive effect to a state court decision beyond the scope envisioned under the full faith and credit requirements of federal law. Third, it would effectively impose a requirement on potential civil rights plaintiffs to intervene in ongoing proceedings contrary to this Court's opinion in *Martin v. Wilks*, 490 U.S. 755 (1989). Finally, it would extend the *Rooker-Feldman* doctrine in an unprecedented manner, contrary to the due process clause of the United States Constitution.[8]

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white voters are not a protected class under § 2 and no result claim can be, or in any case, has been proven. There is absolutely no proof of polarized voting between specific subsegments of the white community and others, assuming that such segments could be considered a protected class.

[8] By focusing on the litigative status of a non-party to the State proceedings, Amici do not imply any position with respect to those who were parties to the State proceedings.

A. The United States District Court Was Not Obligated To Abstain In-Lieu Of State Court Proceedings

It is A general principle of federal law that a plaintiff who properly invokes the jurisdiction of the federal court to adjudicate federal claims should not be divested of that jurisdiction. As the Court in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) explained:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 53 L. Ed. 382, 394, 29 S. Ct. 192, 48 LRA NS 1134.

375 U.S. at 415 (footnote omitted).

Here, plaintiff United States had clearly asserted federal claims and was thus entitled to adjudicate its claims in federal court unless the district court was required to abstain.

Abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy

before it. *County of Allegheny v. Mashuda*, 360 U.S. 185, 188 (1959); *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 14 (1983). Abdication of the obligation of the District Court to adjudicate the controversy properly before it "can be justified only in the exceptional circumstance where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Mashuda*, 360 U.S. at 188-189. The "task in such cases is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that . . . justify the *surrender* of that jurisdiction." *Moses H. Cone Hospital*, 460 U.S. at 25-26 (emphasis in original). Moreover, where federal law provides the rule of decision on the merits, abstention should be avoided. *Id.* at 23-26. Here, there are no "exceptional" circumstances nor are there the "clearest of justifications" necessary to divest plaintiff, United States, of its chosen federal forum.

1. The Potential Impact Of Delay On The Right To Vote Precluded Deferral

Abstention is improper if the effect of abstention is to delay adjudicating important federal voting rights. Although the State has an interest in reapportioning its Congressional seats; *see, e.g., Scott v. Germano*, 381 U.S. 407 (1965); *Bianchi v. Griffing*, 393 F.2d 457 (2d Cir. 1968); that interest becomes subordinate to the countervailing federal interests of voting rights plaintiffs when the State has so delayed asserting its interests as to potentially impair plaintiffs' rights; *Harman v. Forssenius*, 380 U.S. 528

(1965); *Badham v. U.S. Dist. Ct. For N. Dist. of Cal.*, 721 F.2d 1170 (9th Cir. 1983); *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971); *Cavanagh v. Brock*, 577 F. Supp. 176, 180 n.4 (E.D.N.C. 1983) (three judge court); *Skolnick v. State Electoral Bd of Illinois*, 336 F. Supp. 839, 869-871 (N.D. Ill. 1971) (three judge court). *See also Badham*, 721 F.2d at 1172-73 ("The dangers posed by an abstention order are particularly evident in voting cases. . . . We . . . hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote."); *Edwards*, 437 F.2d 1240; *Brock*, 577 F. Supp. at 180 n.4; *Skolnick*, 336 F. Supp. at 869-871.

Most recently, this Court in *Growe v. Emison*, 61 U.S.L.W. 4163, 4167 (U. S. February 23, 1993), similarly emphasized that a Federal district court would be "justified in adopting its own plan if [it] had been apparent that the State court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries," and that a Federal Court was required to defer its adjudication, *not* abstain. *Id.*

Here, at the time the district court was adjudicating the claims of the United States, there were effectively no ongoing State proceedings, but there were impending elections. Thus, the district court properly adjudicated the federal claims before it.

2. The United States Was Not Precluded By The Full Faith And Credit Statute

This Court in *Growe* explained the appropriate procedure to be followed by a Federal district court when there are similar redistricting claims in both federal and state forums. Once a state court adopts a redistricting plan, assuming no preclearance requirement, the plan becomes the law of that state. 61 U.S.L.W. at 4166. At that time, "the elementary principals of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligated the federal court to give the judgment *legal effect*." *Id.* (emphasis in original). Nevertheless, after the State court renders a judgment, the federal court is "empowered to entertain . . . plaintiffs' claims relating to legislative redistricting . . . to the extent those claims challenge[ ] the *state court's* plan." *Id.* (emphasis in original).

Here, plaintiff United States was not a party to the state court proceeding and therefore, was not bound by the full faith and credit statute. According to appellants, a judgment was rendered by the Florida court. Therefore, under *Growe*, plaintiff United States was properly before the federal court "to the extent those claims challenged the *State Court's* plan."

a. Plaintiff United States Is Not Bound By The Full Faith And Credit Statute

The preclusive effect of a state court judgment in a subsequent federal court action is determined entirely by the full faith and credit statute, 28 U.S.C. § 1738. This

statute in turn requires that the federal court look exclusively to state law to determine the preclusive effort of a state court judgment. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chemical Construc. Corp.*, 456 U.S. 461 (1982). As the Court stated in *Kremer*: "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." 456 U.S. at 481-82. Similarly, the Court in *Marrese* stated: "Section 1738 embodies concerns of comity and federalism that allow States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." 470 U.S. at 380. Thus, a federal court cannot give greater preclusive effect to a state court judgment than the state court itself would give it. *Migra* v. *Warren City School Dist. Board of Educ.*, 465 U.S. 75 (1984); *Marrese*, at 384-386. It may deny preclusive effect, however, if requirements of due process are not met. *Kremer, supra*, 456 U.S. at 482-83.

Here, appellants make no assertion that the United States was bound by *res judicata* principles of Florida law either as a party or as being in privity with a party. As this Court stated in similar circumstances, regarding the preclusive effect of a State court decision under the Voting Rights Act to which the United States was not a party, "The [United States] Attorney General is not bound by the resolution of Section 5 issues in cases to which he [or she] was not a party." *Hathorn v. Lovorn*, 457 U.S. at 268 n.23 (1982).

b. Precluding Plaintiff United States Would Violate Due Process Requirements And Be Contrary To This Court's Decision In *Martin v. Wilks*

"[A] state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or opportunity to be heard, so it cannot without disregarding due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Postal Telegraph-Cable Company v. City of Newpost*, 247 U.S. 464, 476 (1917). Here, there is no assertion that the United States was either a party or in privity with a party in the state court proceedings. Full faith and credit will not be afforded to give preclusive effect to a decision which does not, as here, meet due process requirements. Moreover, it is of no moment that the United States did not intervene in the State court proceedings.

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934); *Martin v. Wilks*, 490 U.S. at 763, 765 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. . . . Joinder as party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and

bound by a judgment or decree"). This is especially true here where the United States specifically chose a federal forum to litigate its federal claims. Civil rights plaintiffs have a *right* to choose a federal forum. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964); *Willcox v. Consolidated Gas Co.*, 212 U.S. 219, 240 (1909) ("When a Federal Court is properly appealed to in a case over which it is its duty to take jurisdiction . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.")

c. The District Court Had Jurisdiction

Appellants argue that the district court had no subject matter jurisdiction under the *Rooker-Feldman* doctrine because plaintiff United States was collaterally attacking the state court decision. Their argument is fatally flawed because the United States was not a party in the state court action, which precludes application of the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine prevents an unsuccessful party in a state court action from asking a United States District Court to act as an appellate court, to review the judgment of the state court in an action in which they were a party. Since there was no prior state court proceeding to which the United States was a party, the *Rooker-Feldman* doctrine is necessarily inapplicable to the case. The basis of the *Rooker-Feldman* doctrine is that a party who lost in a state court proceeding can only obtain review of the state court's judgment in the United States Supreme Court under 28 U.S.C. sec. 1257, and cannot seek what in effect would be an appellate review of that

judgment in a United States District Court by claiming that the judgment itself violated the party's federal rights. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), a party who lost his case in the Indiana courts brought a federal court suit, alleging that the judgment violated the contracts clause and the due process clause. In holding that the federal court lacked subject matter jurisdiction to hear the case, the Supreme Court noted that the parties to the federal court litigation were the same as the parties to the state court litigation, and stated: "If the constitutional question stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them, and their decision, whether right or wrong was an exercise of jurisdiction . . . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction." 263 U.S. at 415-416.

In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), a law school graduate, in proceedings before the District of Columbia court system, sought a waiver of a rule that made him ineligible to take the District of Columbia bar examination. When he lost there, he brought another suit in the United States District Court for the District of Columbia, seeking review of that decision. The Supreme Court held that since the District of Columbia court system was a "state" for purposes of 28 U.S.C. § 1257, and since the proceedings before that court were "judicial" in nature, review of that decision could be sought only in the Supreme Court. The district

court lacked subject matter jurisdiction to review it in an original action.

Here, the United States was not a party to the state court proceeding and is therefore not precluded by the *Rooker-Feldman* doctrine.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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